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No. 824

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Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN-GRACE AIRWAYS, INC., and BRANIFF AIRWAYS, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I

For reasons quite understandable in view of the unquestionable novelty and importance of the question presented in the petition, respondents in their briefs in opposition go to the merits. Their discussion of the

merits is wholly unconvincing that the decision below is correct beyond the kind of doubt that would ordinarily move this Court to take in hand a question of federal law that it had not resolved. More than that, their discussion of the case serves to point up the importance of the question presented by these petitioners. Indeed, the briefs in opposition make clear that on the view of respondents, including the Civil Aeronautics Board itself, the decision below has the most significant and unsettling implications for the law governing disposition by the Board and the President of applications for foreign air carrier permits, implications that go even beyond the question here whether such permits can be granted without domestic carriers having been heard on competing, mutually exclusive applications.

Respondents state the point in various ways, but the gist of their principal argument is this: Where a foreign air carrier applies for authority to operate between specific named points, United States and foreign, and it has been designated by its government pursuant to an international agreement that describes in the vaguest of terms a route into which the specific route applied for can be fitted, the Civil Aeronautics Board has practically no choice but to recommend to the President granting of the application or denunciation of the agreement.

To make this argument respondents must read out of this country's international air transport agreements a provision common to all of them, including the Executive Agreement between the United States and West Germany involved here. That provision carries the dignity of a Presidential declaration to Congress that its inclusion is deliberate and important and it means just what it says.

Article 3 of the United States-German Agreement provides that an airline or airlines designated by one country "may be required to qualify before the competent aeronautical authorities of" the other country, "under the laws and regulations normally applied by those authorities, before being permitted to engage in the operations contemplated by this Agreement." Article 1(a) of the Agreement defines "aeronautical authorities" in the case of the United States as the Civil Aeronautics Board. There are comparable provisions in all United States international agreements providing for the reciprocal exchange of commercial air transport rights. In 1946 President Truman in a message to Congress said of such agreements:

> "Naturally, agreements of this nature to which the United States is a party are consistent with the requirements of the Civil Aeronautics Act, are valid under its terms, and fully protect the public interest. Under these agreements, before foreign air carrier permits are issued by the United States to foreign airlines, they must qualify under the provisions of the Civil Aeronautics Act [now the Federal Aviation Act]."[1]

President Truman's understanding accords with that of the sponsors of the bill that became the Civil Aeronautics Act of 1938. In answer to a congressman's

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[1] 92 Cong. Rec. 6661, 6662 (1946), quoted in 40 Ops. Att'y Gen. 451, 452 (1946). In the cited opinion the Attorney General said that he concurred in what he understood to be the position of the Department of State that "the jurisdiction of the Civil Aeronautics Board in connection with the granting of permits is not affected by any of the civil aviation agreements which have been concluded, and that the Board in each case must still decide whether the applicant carrier is a suitable airline for performance under the requested permit and whether the issuance of the permit would meet the other requirements of the statute." *Id.* at 453.

question two of the sponsors stated that it would not be possible for the Secretary of State to negotiate a binding agreement that might supersede the powers of the Board to pass upon permit applications. *Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce,* 75th Cong., 3d Sess. 41 (1938).

There is no doubt, then, that consistently with the terms of the United States-German Agreement, Lufthansa must prove its case under Section 402 of the Federal Aviation Act before it is entitled to a permit to operate a New York-Caribbean-South American route. Section 402(b) provides that the Board may issue a permit only if it finds both that the applicant is fit and that the transportation proposed would be in the public interest. Contrary findings—a finding, for example, that the proposed transportation would not be in the public interest—on the basis of which the Board would recommend denial of an application, would not be in derogation of the agreement but within its clear contemplation.

Nevertheless, respondents say, the very existence of the agreement to a very large extent defines what is in the public interest. Thus, the Board says that "the existence of a bilateral agreement represents a *prima facie* public interest factor pointing to the grant of the application of the carrier designated by the foreign government to operate the route" (CAB Br. in Opp. p. 4), and that "the international commitments by this nation and the benefits to the entire air transportation system embodied in a bilateral agreement constitute important public interest factors which properly are taken into account by the Board in processing an application under Section 402 . . ." (*id.* p. 13). Lufthansa

says that "the true contest is not between petitioners and Lufthansa as applicant herein, but between petitioners and the route exchange as a whole in the United States-German agreement." (Lufthansa Br. in Opp. p. 15). The Secretary of State is of the view that a conclusion by the Board that Lufthansa's proposed service is not in the public interest "would require a holding, approved by the President, that the international agreement itself is not in the public interest and that steps should be taken to withdraw from the agreement or to modify it." (CAB Br. in Opp. p. 29). And both respondents quote with approval from the opinion of the court below a statement that "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings. . . ." (CAB Br. in Opp. p. 9; Lufthansa Br. in Opp. pp. 15-16).

Petitioners are not asking for any such inquiry into the wisdom of the Executive Agreement or the motives for concluding it. Nor do they seek to have the agreement denounced. They merely seek the opportunity for a meaningful hearing in which there may be developed an evidentiary record on the basis of which the Board can recommend and the President decide whether, if there is not room for all three carriers on the route, their services or Lufthansa's will better serve the public interest and the public convenience and necessity. Only in this way, they believe, can the public interest be protected as President Truman said it was by international air transport agreements.

Petitioners are at a loss to find in the text of the Executive Agreement or in any section of the Federal Aviation Act a provision placing upon them some extraordinary burden to show that Lufthansa's opera-

tions, even though they would preclude the certification of one or both of petitioners, are inimical to the public interest so as "to warrant a recommendation to the President by the Board that the application should be denied or the bilateral denounced." (CAB Br. in Opp. p. 4).

More particularly, they do not find any such burden imposed by Section 1102 of the Act, on which respondents heavily rely. Section 1102 is a general direction to the Board and to the Administrator of the Federal Aviation Agency to perform consistently with the international agreements of this country the functions each of them is charged with under the various provisions of the Act. Section 1102 does not on its face define the public interest as used in Section 402 or qualify the factors that the Board is directed by Section 102 to consider both as being in the public interest and in accordance with the public convenience and necessity.[2] Very probably, as we said in our petition, Section 1102 has the effect of eliminating, in the case of an applicant designated by a foreign government pursuant to an agreement, the discretion the Board would otherwise have to refuse a permit to a qualified foreign air carrier applicant whose service would be in the public interest. (Pet. pp. 9-10). It may also have the effect of requiring that any permit issued by the Board to Lufthansa allow (not forbid) Lufthansa to meet the needs of local traffic between the United

[2] The Board early in its career decided in a case in which there was an international agreement that did not specify the route applied for that "public interest" as used in § 402 of the Act "is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives," namely those specified in what was then § 2 and is now § 102 of the Act. Canadian Colonial Airways, Ltd., 3 C.A.B. 50, 56 (1941).

States and South America in accordance with Article 10(2)(c) of the Agreement.[3]

In any event, only this Court can settle the question now mooted whether, despite the terms of Article 3 of the Agreement, as clearly explained by President Truman, and of Sections 102 and 402 of the Act, the phrase public interest as used in Section 402 means something different from what it means in any other proceeding under the statute when an applicant for a permit under that section is a carrier designated by a foreign government pursuant to an agreement.

This question of law has recurrently troubled the Board, and Board members have not been of one mind. In *British Overseas Airways Corp.*, 29 C.A.B. 583 (1959), the issue was not competing applications but the impact of a significant amendment to a foreign air carrier's permit upon existing services of domestic carriers. The amendment was contemplated by an executive agreement. The Board granted the foreign carrier's application despite its own finding that $7,300,000 in annual revenues would be diverted from United States carriers. In doing so, it said that "if an affected U.S. carrier demonstrated that the economical consequences of a route exchange would be disastrous to its system, or that the basic agreement was improvident, then the Board might take the necessary steps to recommend renunciation of the bilateral." *Id.* at 593. In the view of a concurring member, a clear case had been made for denying the application as not in the public interest.[4] He recom-

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[3] See pp. 9-10, *infra*.

[4] "If there was ever a case where the Board should exercise its purported independent power to find that a route granted in a bilateral is not in the public interest, it is this one." 29 C.A.B. at 596 (Member Hector, concurring).

mended that the Board forthrightly state that it would recommend the granting of any application by a carrier designated by a foreign government pursuant to an executive agreement. *Id.* at 594-98. The Chairman of the Board, in response to the concurring Member, said that the statute requires that the Board evaluate "foreign permit applications in light of conventional public interest considerations," which he specified as "economic considerations" and which, he said, must be viewed "in light of the bilateral." *Id.* at 594.

It is for this Court to decide whether the public interest under Section 402 is determined by the existence of a bilateral agreement or whether—what practically amounts to the same thing—only a showing, which no United States carrier has ever been able to make, that would justify denunciation of the agreement is sufficient to warrant denial of a designated foreign carrier's application; or whether, alternatively and as the Chairman of the Board said in the *BOAC* case, the Board is bound to consider conventional public interest factors in every case arising under Section 402. The opportunity for making the decision is provided by our petition. If the Board is meaningfully to evaluate the public interest questions raised by Lufthansa's application, so that the Board may give the President the "advice and information that we are required, under the statute, to give him and which he, under the statute, has a right to expect from us," 29 C.A.B. at 594 (Chairman Durfee, concurring), it can do so only by a contemporaneous comparison of the Lufthansa application with the mutually exclusive applications of petitioners.

II

Lufthansa in particular and the Board also urge that Lufthansa's service will not be competitive with the services that petitioners seek authority to provide because under the Agreement Lufthansa must gear its capacity to the demands of traffic between Germany and South America moving by way of New York and not to the demands of traffic between New York and South America.

We have already noted that capacity controls are not effective. (Pet. p. 12 n.4). We would point out further that the traffic flow between New York and South America is such that service is measured in flights per week, not per day, so that the two large capacity jet round trips that Lufthansa proposes initially to operate (J.A. 34) will make a substantial addition to the seats available to transport local New York-South American passengers.

Moreover, Lufthansa's paraphrase of the capacity provision of the Agreement (Lufthansa Br. in Opp. p. 11) is incomplete, as the quotation in Lufthansa's brief in opposition (*id.* pp. 11-12) shows. The relevant article, Article 10, provides in paragraph (2) that the right to carry traffic to and from Caribbean and South American countries is subject to the general principle that capacity should be related to (a) traffic requirements between Germany and such countries, (b) the requirements of through airline operations and (c) "the traffic requirements of the area through which the airline passes [*i.e.*, the area between New York and the Caribbean and South America] after taking account of local and regional services." Article 10,

then, clearly contemplates that Lufthansa *may* provide service for the benefit of New York-South America passengers subject only to the requirement, so vaguely stated as to be difficult to enforce even if there were a disposition to enforce it, that it take account of local and regional services. Quite obviously, it is not the handful of passengers to and from Germany who will choose to fly by way of New York rather than taking advantage of Lufthansa's direct service between Germany and South America that will support Lufthansa's two weekly jet roundtrips. And, if Lufthansa is awarded a permit before petitioners' applications for certificates are passed upon, the only local or regional services provided by United States flag carriers that Lufthansa, in the best of faith, would have to take into account in determining its capacity would be the existing services, which are interchange services, with their recognized disadvantages and awkwardnesses.

III

As we suggested in our petition would probably happen, respondents in their briefs in opposition have themselves raised the important question whether Section 1006(a) of the Act, precluding judicial review of "any order in respect of any foreign air carrier subject to the approval of the President," should be extended to cover any otherwise reviewable order entered in a proceeding in which there may ultimately be an order subject to Presidential approval. (CAB Br. in Opp. pp. 15-16; Lufthansa Br. in Opp. pp. 18-19).

We have stated our views on this question in our petition. (Pet. pp. 15-16). Here we would add that the Board has introduced further confusion and em-

phasized the unsettled nature of the law in this important area by its statement that, since the decision in *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1947), "the government has suggested, with respect to review of orders approved by the President, that review may be had, after the President has acted, on the limited question of whether the President and the Board have exceeded their constitutional and statutory authority." (CAB Br. in Opp. p. 16 n.8). Contrary to the Board's further statement that no such claim is or could be made in this case, petitioners' claim is that the Board has exceeded its statutory authority by denying them the hearing to which the statute entitles them. If, on the view of the Government, that question could be reviewed after the award of a permit to Lufthansa, it surely may be reviewed now, embodied as it is in an order that—as respondents do not deny—has all the elements of finality to make it reviewable.

IV

The respondents emphasize—as if it were a controlling consideration—the delay that they say would be entailed in consolidating the three applications. (CAB Br. in Opp. pp. 13-14; Lufthansa Br. in Opp. pp. 5-6). They would sacrifice a domestic carrier's right to a comparative hearing in favor of prompt action on a designated foreign air carrier's application despite the fact that Section 401(c) of the Act requires the Board to dispose of an application for a domestic carrier certificate "as speedily as possible," just as Section 402(d) requires that an application for a foreign air carrier permit be disposed of "as speedily as possible."

Judge McGowan, dissenting below, took note of this contention, saying that what was argued in substance was that the Board could not hear all three applications before making its recommendation to the President

> "because it will take too long to hear and pass upon petitioners' applications; and that the resulting delay will embarrass the President and the Secretary of State in their conduct of our relations with Germany." (Pet. p. 23a).

He answered that the doctrine of *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), appeared "to contemplate some delay as a price Congress was willing to pay for fairness." He added that the record did not show that the Board was incapable of hearing and determining the applications "with greater dispatch than has perhaps been characteristic of major route proceedings in the past." (Pet. p. 23a). We would add further that there is much in the *United States-Caribbean-South America Investigation*, in which petitioners' competing applications are to be heard, that is utterly irrelevant to the issues raised by Lufthansa's application, and the Board is perfectly capable of devising a procedure that would permit those issues to be heard and determined with dispatch but at the same time with fairness to petitioners.

CONCLUSION

The petition for writ of certiorari should be granted.

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